STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 126930

CHRISTOPHER MCKAY,

Defendant-Appellant.

Lower Court No. 03-002007-01
Court Of Appeals No. 255596

126930

PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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The People do not contest jurisdiction for purposes of this brief in opposition to defendant's application for leave to appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Did the sentencing court err by addressing defense counsel's arguments for a deviation from the *Cobbs* evaluation before allowing defendant to allocute?

The People answer: No.
Defendant answers: Yes.

II.

May defendant raise an unpreserved challenge to the scoring of offense variable sixteen where his sentence falls within the guidelines range that he claims applies to his conviction?

The People answer: No.
Defendant answers: Yes.

COUNTER-STATEMENT OF FACTS

This case arises out of the robbery of a Bank One in Harper Woods, Michigan on January 24, 2003. Defendant, while holding one hand in his upper coat pocket, handed a bank teller a note that read "100s and 50s." The teller gave defendant money. Defendant took the bills and the note and left the building. 5/5/03, 11-12.[1]

The People charged defendant with bank robbery,[2] and filed a notice of intent to enhance defendant's sentence as a habitual fourth offender. On April 25, 2003, defendant was arraigned in Wayne Circuit Court before the Honorable Kym L. Worthy. At the hearing, the People offered to dismiss another bank robbery charge[3] in exchange for defendant pleading guilty in this case, and defendant requested that the court make a preliminary evaluation of his sentence under *People v Cobbs.*[4] 4/25/03, 3-7.

The People informed the court that the guidelines for sentencing defendant as a habitual fourth offender were 50 to 200 months. The court inquired about defendant's prior convictions, and learned that he had been convicted of three counts of armed robbery in 1991 and had received sentences of five to fifteen years. Defendant was paroled in 1996, but violated the conditions of his parole and returned to prison eighteen months later. Defendant was paroled again in 2001 and was on parole at the time of the bank robbery. Because of that fact, any

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[1] Transcripts are cited throughout this brief in the following form: month/day of proceedings, page numbers.

[2] MCL 750.531.

[3] Case No. 03-4572.

[4] *People v Cobbs,* 443 Mich 276; 505 NW2d 208 (1993).

sentence would be served after defendant completed his sentences for the 1991 convictions. 4/25/03, 6-15. On consideration of that information, the court stated that if defendant pleaded guilty he would receive a sentence of nine to fifteen years, consecutive to the sentence he was already serving. The court noted that the sentence was "exceedingly generous coming from me." 4/25/03, 16.

Defendant declined the plea offer. 4/25/03, 16. Defendant, however, returned to court for a final conference five days later and requested that the reconsider its sentence evaluation. 4/30/03, 6. The court stated that it would not revisit or reconsider the evaluation, and after again inquiring about defendant's prior convictions, stated that it was not "going any lower than 9 years." The court noted that it was "crazy for offering the 9 to 15 " because the sentence was "exceedingly lenient, way to lenient, especially for me" and "ridiculously lenient." 4/30/03, 8.

Defendant ultimately decided to accept the plea offer, and on May 5, 2003, pleaded no contest to bank robbery. 5/5/03, 3-11. Defense counsel then inquired whether the court would "possibly lower the sentence." The court stated that "the chances are very very minimal, highly unlikely," but noted that its "mind [was] not closed." 5/5/03, 13.

At the sentencing hearing held on May 19, 2003, the court calculated the guidelines range for defendant's conviction as 50 to 200 months. Defendant objected to the court assessing twenty-five points for offense variable thirteen (OV 13) because his bank robbery convictions were "quite a ways distance away. So how many years makes a pattern, I don't know." In response to the court's observation that "there's still a connection in terms of time" because defendant was on parole, counsel stated "I think the Court has to make a call on that." The court rejected the challenge and assessed twenty-five points under the variable. 5/5/03, 3-6; SIR.

Defense counsel then argued for a reduced sentence, requesting that the court "go a little bit lower" than the *Cobbs* evaluation. In response, the court referenced similar sentences it had recently imposed for first-time offenders convicted of armed robbery to explain why the "sentence that I told you I would give you was exceedingly lenient." The court stated that it would not lower the sentence because "[i]t's exceedingly fair, it's more than fair." The court emphasized that a key factor in selecting the sentence was that it would be consecutive to defendant's sentences for his prior convictions because he was on parole at the time he committed the sentencing offense. The court stated "I'm not going any lower than I already have in this case" and "I'm not changing the sentence." 5/5/03, 6-10.

The Court provided defendant with two opportunities to allocute. Defendant availed himself of the second opportunity, and stated that he was responsible for his actions and would accept whatever the court "put on" him. 5/5/03, 12. The court then sentenced defendant to a term of imprisonment of nine to fifteen years. 5/5/03, 12.

On June 30, 2004, the Court of Appeals denied defendant's delayed application for leave to appeal. On August 24, 2004, the Court denied defendant's motion for reconsideration.

On September 1, 2004, defendant filed an application in this Court for leave to appeal from the decision of the Court of Appeals.

On February 25, 2005, the Court directed the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. The Court limited oral argument to the issue whether OV 13 was properly scored. The order further provided that the "parties may file supplemental briefs within 28 days of the date of this order."

ARGUMENT

I.

The sentencing court did not err, much less commit plain error that affected defendant's rights, by addressing defense counsel's arguments for a deviation from the *Cobbs* evaluation before allowing defendant to allocute.

Standard of Review

The plain error standard of review applies to this issue because defendant did not preserve it by objection or other action in the trial court. 5/19/03, 11-12. In extending the forfeiture rule to claims of constitutional error in *People v Carines*,[5] this Court reasoned that regardless of whether the error is constitutional or nonconstitutional, "requiring a contemporaneous objection provides the trial court 'an opportunity to correct there error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights.'" In *Johnson v United States,*[6] a case on which this Court relied in *Carines*, the United States Supreme Court rejected the argument that a claim of "structural error" removes it from the plain error rule. As the Court explained, "[t]he seriousness of the error claimed does not remove consideration of it from the ambit" of the rules of criminal procedure.[7]

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[5] *People v Carines,* 460 Mich 750, 764-765; 597 NW2d 130 (1999), quoting *People v Grant,* 445 Mich 535, 551; 520 NW2d 123 (1994).

[6] *Johnson v United States,* 520 US 461, 466; 117 S Ct 1544; 137 L Ed 2d 718 (1997).

[7] *Id.* at 466; see also *People v Allen*, 466 Mich 86; 643 NW2d 227 (2002) (applying the plain error standard of review to unpreserved claim involving a trial court's failure to explain the concept of reasonable doubt).

Granted, in *People v Petit,*[8] the Court did not expressly apply the forfeiture rule to an unpreserved claim involving allocution. That omission should not be interpreted as creating an exception to the forfeiture rule. The forfeiture rule applies to all unpreserved claims of error, and the Court must not treat allocution differently from the constitutional errors considered in *Carines.*

To avoid forfeiture, defendant must show plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. Even if those requirements are met, the Court must still exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain error resulted in conviction of an actually innocent defendant or the error seriously affected the fairness, integrity or public reputation of judicial proceedings.[9]

Discussion

Defendant's claim of a violation of his right of allocution is devoid of merit. The trial court complied with the court rules by allowing defendant the opportunity to personally address the court before the court imposed sentence. After defendant availed himself of that right, the court sentenced defendant in accordance with its *Cobbs* evaluation.

MCR 6.425(D)(2)(c) provides that, at sentencing, the trial court must "give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." In *People v Petit,* this Court construed that rule as requiring "the trial court to provide a defendant with an

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[8] *People v Petit,* 466 Mich 624, 627-633; 648 NW2d 193 (2002).

[9] *Carines*, *supra* at 763, 774.

'opportunity' to address the court before the sentence is imposed."[10] *Petit* overruled *People v Berry,*[11] in which the Court had interpreted the former version of the court rule[12] as requiring that a trial court specifically ask the defendant if he has anything to say before being sentenced and necessitating resentencing whenever a court failed to do so. *Petit* explained that the court rule no longer states that the failure to comply with the rule shall require resentencing and now merely requires that the defendant be given an opportunity to allocute.[13]

In the instant case, the trial court complied with MCR 6.425(D)(2)(c). After resolving the parties' objections to the scoring of the guidelines, the court permitted defense counsel to allocute on defendant's behalf. 5/19/03, 6-8. In response to counsel's request that the court "go a little bit lower" than the *Cobbs* evaluation, the court explained that the "sentence that I told you I would give you was exceedingly lenient" and that the court would not lower it because "[i]t's exceedingly fair, it's more than fair." 5/19/03, 9-10. The court then asked the assistant prosecutor whether she had anything to say. She replied "no."

The court directly addressed defendant after allowing the attorneys an opportunity to speak:

> THE COURT: Mr. McKay, you have a right under the law, sir, to tell me anything you want me to know before I sentence you.
>
> MR. MCKAY: No, I don't have anything to say.

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[10] *Petit, supra* at 627.

[11] *People v Berry,* 409 Mich 774, 780-781; 298 NW2d 434 (1980).

[12] GCR 1963, 785.8.

[13] *Petit, supra* at 632-633.

5/19/03, 11.

The court provided defendant a second opportunity to allocute after counsel explained that defendant was upset because "other people in the jail are getting lesser sentences for murders and stuff like that." 5/19/03, 11.

> THE COURT: I can't speak for anything that happens to any other defendants except the one's that come before me. That's the only thing I can speak for and that's the only thing I'm going to take responsibility for.
>
> I'm sorry, Mr. McKay. I don't know if I asked you but did you want to say something? You have a right under the law to tell me anything you want me to know before I sentence you.
>
> MR. MCKAY: I just want the Court to acknowledge that, you know, I don't point my fingers at anyone as far as my crime is concerned. I'm responsible for my actions and I'll accept that responsibility so whatever you do put on me I'm willing to accept that.
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> 5/19/03, 11-12.

The court then sentenced defendant to a term of imprisonment of nine to fifteen years. 5/19, 12.

The record thus reveals that the trial court complied fully with the court rule by giving defendant an opportunity to allocute *before* imposing sentence. That the court had responded to defense counsel's pleas for a lower sentence is of no moment. Nothing in the court rule requires that a sentencing judge refrain from any discussion of the sentence until a defendant has an opportunity to allocute.

Defendant's reliance on *People v McNeal*[14] is misplaced. To the extent that *McNeal* held that a sentencing judge denies a defendant his right of allocution if he decided on the appropriate sentence before a defendant allocutes, it was wrongly decided. A defendant simply must be

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[14] *People v McNeal,* 150 Mich App 85; 389 NW2d 708 (1986).

given an opportunity to advise the court of circumstances he believes the court should consider in imposing sentence. As long as the defendant has that opportunity, no violation of his rights has occurred. Any other rule would encourage speculation regarding a sentencing judge's thought processes in an effort to ascertain the exact point when the judge made a "final decision" regarding the sentence.

Further, *McNeal* is factually distinguishable from the instant case. In *McNeal,* the Court of Appeals had remanded the case for reconsideration of the defendant's sentence in light of *People v Coles.*[15] On remand, the successor to the original sentencing judge indicated during a conference in chambers that he would not change the sentence. The judge reiterated his intent to impose the same sentence when, after offering defendant and defense counsel the opportunity to allocute, counsel questioned the value of allocution.

Here, in contrast, the trial court had made a preliminary evaluation regarding the appropriate sentence before defendant pleaded no contest to the bank robbery charge. 4/30/03, 16; 5/5/03, 4. When, at sentencing, counsel articulated the factors he believed supported a lower sentence than the preliminary evaluation, the court simply explained why it was not persuaded by counsel's argument and still believed that the nine to fifteen year sentence was the appropriate one. 5/19/03, 6-10. Unlike *McNeal*, those remarks did not foreclose the possibility that defendant might articulate some circumstances during his allocution that would cause the court to impose a lower sentence. Accordingly, there was no error, let alone clear or obvious error, in the sentencing procedure.

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[15] *People v Coles,* 417 Mich 523; 339 NW2d 440 (1983).

Next, even assuming arguendo that plain error exists, the error did not affect defendant's substantial rights. The alleged error was simply one of timing. Defendant had two opportunities to speak to the court during sentencing, and merely stated his willingness to accept responsibility for his actions. The court's statements that it believed that the nine to fifteen year sentence was exceedingly lenient and fair show that the alleged error was not outcome determinative.

Finally, this Court should decline to exercise its discretion to grant defendant relief. The alleged error is not one that seriously affects the fairness, integrity or public reputation of judicial proceedings because defendant has identified no additional circumstances that would cause a sentencing judge to reconsider the *Cobbs* evaluation. The issue is therefore forfeited.

II.

Defendant is barred by statute from raising an unpreserved challenge to the scoring of offense variable sixteen because his sentence falls within the guidelines range that he claims applies to his conviction.

Discussion

MCL 769.34(10) bars defendant from raising an issue regarding the scoring of OV 16. The statute provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

In *People v Kimble,*[16] this Court construed the statute as not precluding appellate review if the sentence is outside the appropriate guidelines range. The Court concluded that while a defendant avoids the statutory bar under those circumstances, he still must satisfy the "plain error standard" to obtain relief on the basis of the unpreserved claim of error.[17]

In this case, defendant did not preserve his challenge to the scoring of OV 16 by objecting on the same ground at the sentencing hearing as he raises on appeal. At sentencing, defendant argued that his armed robbery convictions "are quite a ways distance away. So how many years makes a pattern, I don't know." 5/19/03, 5. When the court noted that "there's still a connection

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[16] *People v Kimble,* 470 Mich 305, 310; 684 NW2d 669 (2004).

[17] *Id.* at 312.

in terms of time" because defendant was on parole for armed robbery, defendant stated "I think the Court has to make a call on that." 5/19/03, 6. Defendant never argued that MCL 777.43(2)(a) prohibits a court from considering crimes committed more than five years before the sentencing offense. Defendant's objection on one ground did not preserve his appellate attack based on that different ground.[18]

MCL 769.34(10), as construed in *Kimble*, bars defendant from raising his unpreserved claim. *Kimble* equated the phrase "appropriate guidelines sentence range" with the sentence range generated by correctly scored offense and prior record variables. In *Kimble,* the defendant could raise a claim of scoring error because his sentence was outside the correct guidelines range.[19] Here, in contrast, defendant concedes that his nine-year minimum term falls within the guidelines range even if he had received zero points for OV 13.[20] Accordingly, whether defendant characterizes his claim as a challenge to the scoring of the guidelines or the accuracy of the information relied on by the sentencing court, MCL 769.34(10) bars him from raising his claim on appeal. For that reason, this Court must deny defendant's application for leave to appeal.

In any event, assuming arguendo that defendant preserved his claim, he is entitled to no relief. Resolution of this case turns on the construction of the statute governing the scoring of

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[18] *Id.* at 309.

[19] *Id.* at 312.

[20] Defendant's Application for Leave to Appeal, p 9. The guidelines range for sentencing defendant as habitual offender, fourth, was fifty to 200 months (OV level IV, PRV level F). If no points had been assessed for OV 13, the guidelines range would have been 36 to 142 months (OV level II, PRV level F).

OV 13. In construing a statute, the Court's "obligation is to examine the statute in an effort to discern and give effect to the legislative intent that may reasonably be inferred from the text of the statute itself."[21] Where the statutory language is clear and unambiguous, therefore, the Court applies it as written.[22] Where ambiguity exists, however, the Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished.[23]

MCL 777.43 directs the court to assess twenty-five points under OV 13 if the "offense was part of a pattern of criminal activity involving 3 or more crimes against a person."[24] Subsection 2 of the statute contains instructions which "apply to scoring offense variable 13." MCL 777.43(2)(a) provides that "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."

In *People v McDaniel,*[25] the Court of Appeals focused on the language "a 5-year period" and construed MCL 777.43(2)(a) as not prohibiting a court from finding a pattern of criminal activity on the basis of similar offenses committed by the defendant eleven, twelve, and sixteen years before the sentencing offense. The Court reasoned as follows:

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[21] *People v Thousand,* 465 Mich 149, 164; 631 NW2d 694 (2001).

[22] *Cruz v State Farm Mut Auto Ins Co,* 466 Mich 588, 594; 648 NW2d 591 (2002).

[23] *Macomb Co Prosecutor v Murphy,* 464 Mich 149, 158; 627 NW2d 247 (2001).

[24] MCL 777.43(1)(b).

[25] *People v McDaniel,* 256 Mich App 165, 172-173; 662 NW2d 101 (2003), app dis __ Mich __; __ NW2d __ (2/25/05).

> The statute clearly refers to "a 5-year period." The use of the indefinite article "a" reflects that no particular period is referred to in the statute. Had the Legislature intended the meaning defendant assumes, the statute would refer to "the 5-year period immediately preceding the sentencing offense." Instead, the phrase "including the sentencing offense" modifies "all crimes." That is, the sentencing offence may be counted as one of the three crimes in *a* five-year period. That does not, however, precluded consideration of a five-year period that does not included the sentencing offense.
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> That construction, as well as defendant's proposed construction of the statute, is

predicated on the erroneous assumption that the statute prohibits the consideration of a defendant's criminal activity if those activities took place outside a five-year period. By its plain terms, MCL 777.43(2)(a) only addresses the crimes that the sentencing court *must* count when determining the number of points to assess for OV 13. The decision whether to count other crimes clearly lies within the sentencing court's discretion.

The Legislature, by using the word "shall" in MCL 777.43(2)(a), indicated mandatory action, but only with respect to "all crimes within a 5-year period, including the sentencing offense."[26] Had the Legislature desired to prohibit the consideration of crimes falling outside the period, it would have substituted the word "only" for "all" and enacted a statute providing that "For determining the appropriate points under this variable, *only* crimes within a 5-year period, including the sentencing offense, shall be counted . . . ." To construe the statute as if it included that language would be an impermissible usurpation of the power of the Legislature.

Nor should this Court infer some unstated legislative intent to prohibit the consideration of offenses falling outside a five-year period. When the Legislature desired to prohibit a sentencing court from considering particular offenses in scoring a guidelines variable, it enacted

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[26] *Grant, supra* at 542.

a specific provision containing the prohibition. In fact, in subsections 2(c),[27] 2(e),[28] and 2(f)[29] of MCL 777.43, the Legislature used the phrase "do not" to exclude conduct and offenses from consideration in OV 13. The Legislature similarly used the "do not" language in MCL 777.50[30] to prohibit the consideration of certain convictions in scoring the prior record variables. Given those express prohibitions, this Court may not infer a prohibition from mere silence.

Under the plain language of MCL 777.43(2)(a), the sentencing court must consider all crimes within "a five year period, including the sentencing offense"[31] when determining whether the sentencing offense was part of a pattern of criminal activity. The court may also count other crimes, provided that their consideration is not barred by MCL 77.43(2)(c), (e), or (f). The court

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[27] MCL 777.43(2)(c) provides: "Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12."

[28] MCL 777.43(2)(e) provides: "Do not count more than 1 controlled substance offense arising out of the criminal episode for which the person is being sentenced."

[29] MCL 777.43(2)(f) provides: "Do not count more than 1 crime involving the same controlled substance. For example, do not count conspiracy and a substantive offense involving the same amount of controlled substances or possession and delivery of the same amount of controlled substances."

[30] MCL 777.50(1) provides: "In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or a juvenile adjudication."

[31] In *McDaniel, supra,* the Court of Appeals correctly reasoned that the Legislature's use of the indefinite article "a" rather than "the" meant that the period addressed in subsection 2(a) was not the five-year period immediately preceding the sentencing offenses. The Court, however, incorrectly concluded that the sentencing offense need not have been committed during the period. The Legislature's use of the word "a" signals its recognition that the sentencing offense may not be an offender's most recent criminal act. By selecting that language, the Legislature ensured that the determination whether a crime must be counted would not depend on the order in which the defendant committed his crimes.

must then determine whether the sentencing offense is part of a pattern of criminal activity, and assign the appropriate number of points for the type of crimes involved.[32]

The sentencing court's decision to assess twenty-five points in the instant case thus was not error. Both bank robbery and armed robbery are classified as crimes against a person.[33] That defendant committed the three armed robberies in 1990 did preclude the court from finding that the sentencing offense was part of a pattern of criminal activity involving crimes against a person. The court properly exercised its discretion to consider those offenses since defendant was incarcerated for much of the twelve years that elapsed between the armed robberies and the bank robbery.[34] 5/19/03, 5-6.

Further, even if defendant could show error, the error was undoubtedly harmless. To justify relief on the basis of preserved nonconstitutional error, defendant must demonstrate that it is more probable than not that the error was outcome determinative.[35] "The error is presumed to be harmless, and the defendant bears the burden of showing that the error resulted in a miscarriage of justice."[36]

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[32] See MCL 777.43(1).

[33] MCL 777.5(a); MCL 777.16y.

[34] The PSIR indicates that defendant was sentenced for his armed robbery convictions on January 10, 1991, and was paroled on November 29, 2001. An "Absconder Warrant" was issued for defendant in April, 2002, after he left a drug treatment center without authorization. PSIR, p 4. During the April 25, 2003, hearing at which the court made its *Cobbs* evaluation, defendant stated that he was first paroled in 1996, but he returned to prison eighteen months later after violating the conditions of his parole. 4/25/03, 11-13.

[35] *People v Whittaker,* 465 Mich 422, 427; 635 NW2d 687 (2001); *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[36] *People v Albers,* 258 Mich App 578, 590; 672 NW2d 336 (2003).

In this case, the sentencing court understood that it could impose a lower sentence than it had indicated in its *Cobbs* evaluation and provided counsel with the opportunity to convince it to do so. 5/5/03, 13; 5/19/03, 7-8. After counsel availed himself of that opportunity, the court referenced similar sentences it had recently imposed for first-time offenders convicted of armed robbery to explain why its *Cobbs* evaluation was "exceedingly lenient" and "exceedingly fair." 5/19/03, 8-10. The court emphasized that a key factor in selecting the sentence was that it would be consecutive to defendant's sentences for his prior convictions because he was on parole at the time he committed the sentencing offense. 5/19/03, 9. The court stated "I'm not going any lower than I already have in this case" and "I'm not changing the sentence." 5/19/03, 10.

Those remarks clearly demonstrate that error, if any, in scoring OV 13 was not outcome determinative. This is not a case in which the court was selecting a sentence at a particular end of the guidelines. Whether the guidelines range was 36 to 142 months or 50 to 200 months, the court had no intention of deviating from its *Cobbs* evaluation.

Clearly, no miscarriage of justice occurred in this case. Unlike most defendants who enter into plea agreements that do not include a specific sentence, defendant knew that his sentence would likely be nine to fifteen years when he pleaded no contest in this case. In authorizing the procedure utilized by defendant to obtain that information, this Court observed that a defendant who enters his plea with knowledge of the sentence and later challenges the proportionality of that very sentence "must expect to be denied relief on the ground that the plea demonstrates the defendant's agreement that the sentence is proportionate to the offense and the

offender."[37] Although proportionality is no longer the standard of appellate review,[38] the reasoning of *Cobbs* is still persuasive. A defendant who enters a plea after receiving a *Cobbs* evaluation has agreed that the sentence is appropriate, and should not be able to obtain resentencing on the basis of an erroneously scored variable when his sentence falls within the sentencing guidelines range for his conviction.

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[37] *Cobbs, supra* at 285.

[38] See *People v Babcock,* 469 Mich 247; 666 NW2d 231 (2003).

RELIEF

WHEREFORE, the People request that this Court deny defendant's application for leave to appeal because no manifest injustice will result from the decision of the Court of Appeals.[39]

Respectfully Submitted,

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[39] See MCR 7.302(B).